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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

NUMBER 79-404

UNITED STATES OF AMERICA,

Petitioner

v.

JESUS E. CORTEZ and PEDRO HERNANDEZ-LOERA

Respondents.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondents, JESUS E. CORTEZ and PEDRO HERNANDEZ-LOERA, pursuant to Rule 53, Supreme Court Rules and Title 18, United States Code, §3006A(d)(6), respectively, moves this Honorable Court for leave to file the attached response to the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of costs and to proceed in forma pauperis. Counsel undersigned was appointed to represent the Respondent in the District Court and on appeal to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PEDRO HERNANDEZ-LOERA
and
JESUS E. CORTEZ

Respondents

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RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JESUS E. CORTEZ and PEDRO HERNANDEZ-LOERA, by and through their counsel undersigned, respond to the government's petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals is reported at 595 F.2d 505.

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. 1254(1). This response is filed pursuant to Rule 24(1) of the Revised Rules of the Supreme Court of the United States.

QUESTION PRESENTED

A generalized suspicion of criminal activity is insufficient to justify a founded suspicion seizure when the particular person or vehicle stopped has not engaged in any suspicious activity.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides in pertinent part:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . ."

STATEMENT

I. On January 31, 1977, Messrs. Jesus Cortez and Pedro Hernandez were traveling east on State Highway 86 (RT 149, 155-157). They were stopped by two Border Patrol officers who intended to search the vehicle for aliens (RT 94-96). When the vehicle was stopped, Officer Evans secured the site with his shotgun and Border Patrol Officer Gray advised Mr. Cortez that he was conducting an immigration check and ordered him to open the camper door (RT 158).

As a result of the stop and subsequent search, the defendants were arrested for transporting aliens. The evidence derived from the stop was the aliens, their testimony, the physical evidence of Mr. Hernandez's chevron shoe design and a flashlight (RT 85, 101, 138).

At the time of the stop the officers had no information this particular vehicle was occupied by or used for the purpose of transporting aliens (RT 95-96, 101). On the contrary, the officers were without any information alien activity was afoot either at the observation point or the suspected recovery area.

The officers' decision to stop the vehicle was based upon several assumptions regarding suspected alien activity and the type of vehicles used to transport aliens.

The alien activity originated near San Miguel, Arizona, at the International Border. The officers had tracked various groups of aliens across the 27 miles of desert from the border to State Highway 86. The officers' observations led them to believe the aliens who travelled at night were led by a guide wearing a shoe with a chevron-designed sole[1]. The aliens were recovered between Milepost 119 and 122 on State Highway 86. The officers believed the aliens were recovered by a motor vehicle.

The officers were looking for any vehicle capable of transporting 8 to 20 aliens (RT 74). They were also looking for a vehicle which would not arouse suspicion of criminal activity[2] (RT 74). For these reasons, the officers decided to look for campers, vans, pickups and other vehicles capable of carrying the proposed 8 to 20 people[3] (RT 77). In an effort to narrow the vehicles subject to suspicion, the officers focused their observation to vehicles traveling east to west past their point and returning within one and one-half hours (RT 76, 94-96). During their surveillance, the officers were positioned at Three Points, Arizona. (See Map attached as Exhibit A)

Officer Gray twice testified the recovery vehicle would be going west to east (RT 68-69, 105). The agents theorized the aliens were walking towards their eventual destination, which for this particular route was Tucson, Arizona (RT 104-105). The officers did not believe the aliens would walk towards the oncoming recovery

---

[1] Although the officers had no idea what time movement across the International Border began, they theorized it occurred no earlier than 6:00 p.m. All movement was therefore under cover of darkness. The projected rate of travel was two and a half to three miles per hour. The aliens would take 8 to 12 hours to reach their destination, i.e., between 2:00 and 6:00 a.m. If the aliens had crossed the border before 6:00 p.m., they would have departed Highway 86 before the officers commenced their surveillance (RT 73, 105-106).

[2] Although commercial vehicles such as Haskell Linen trucks would not attract attention, the officers did not feel these vehicles would be engaged in unlawful conduct because of an assumed company policy prohibiting illegal activity (RT 74, 114, 128).

[3] The officers admitted almost any vehicle could have carried the required number of aliens (RT 127).

vehicle in order to see it approach their positions. Instead, the agents believed the vehicle would approach the aliens from behind (RT 68-69, 98, 104-105). But this belies Officer Gray's testimony that:

> "Q And did you make any inferences from their direction of travel of the foot traffic to the east with regard to what direction the vehicle may have taken?
>
> A Yes, sir. We assumed that because the aliens were walking in an eastward direction after hitting the highway that apparently the vehicle would be going in the same direction or that therefore, to myself there wouldn't be any need for them walking in an eastward direction." (RT 68-69)
>
> * * *
>
> "A I don't suppose it would be conclusive they're going east, no.
>
> Q So it would be possible, it would be fair to say, would it not, that a person walking west to east at night --
>
> THE COURT: In the desert.
>
> Q (By Mr. Velasco) In the desert on this highway or off the highway would be doing so so he could keep an eye on a vehicle travelling east to west or look for a vehicle travelling east to west?
>
> A No, sir, that doesn't make much sense to me. If they're going eventually going to go the opposite direction, why --"

II. Upon this evidence the district court denied, without discussion, the defendant's motion to suppress (RT 166). The court of appeals reversed, holding the officers lacked reasonable suspicion justifying the seizure. The Ninth Circuit reversed stating:

> "The founded suspicion test plainly requires balancing of the facts of the particular case . . . Founded suspicion requires some reasonable ground for singling out the person stopped as one who was involved . . . in criminal activity . . ." United States v. Carrizoza-Gaxiola, 523 F.2d 239, at 241 (9th Cir. 1975).

The court of appeals found too many innocent references to be drawn from the defendant's conduct and no references connecting them with any illegal activity so as to make the "officers

suspicions reasonably warranted."

Judge Chambers, dissenting, found a strong possibility that "Chevron" would bring aliens to the highway for recovery by a vehicle. He erroneously asserts the officers "assumed that the group would be walking toward and not away from the pickup vehicle--and toward and not away from their ultimate destination." The agents rejected the former proposition while accepting the latter (RT 68, 105).

REASONS FOR DENYING THE PETITION

The Ninth Circuit correctly concluded the Border Patrol officers lacked reasonable and articulable suspicion justifying the investigatory stop of the vehicle. The court's conclusion is consistent with the standards established in Terry v. Ohio, 392 U.S. 1 (1968) and United States v. Brignoni-Ponce, 422 U.S. 873 (1975).

The court's decision was appropriate on the facts and upon the applicable law. The Border Patrol agent's theory of apprehension had too many deficiencies to rise to the required level of a reasonable founded suspicion. A separate examination of the facts and law will clearly reveal the appropriateness of the Ninth Circuit's reversal. A factual analysis is presented first and will be followed by a discussion of the applicable law.

If the Border Patrol agents were correct in their assumption that the recovery vehicle would come from behind the aliens, the aliens would have been recovered and traveled to Tucson without any suspicion on the part of the officers.

If the vehicle on the other hand traveled westward then eastward, the aliens would have been in a position to observe the vehicle. Border Patrol Officer Gray ruled this out as a possibility. This internal inconsistency militates against the use of the vehicle's direction of travel as a factor in establishing a founded suspicion. As the Appellate Court and officers stated, the vehicle

could have traveled on normal activity to Sells, Arizona, and back within the officers' time frame.

The stop in question was without a founded suspicion for other reasons. First of all, the officers had no specific information or reason to believe the vehicle stopped was occupied by aliens. Secondly, the vehicle itself aroused no suspicion illegal activity was afoot. Thirdly, the officers were without specific information or even generalized information illegal alien activity was afoot along Highway 86 at Three Points, Arizona. The agents were also without any information, general or specific, alien activity had been reported or was suspected along the chevron trail or between Milepost 119 and 122. Even if there was reason to believe illegal activity was afoot on that particular day, the officers had no reason to believe the offense was connected with the vehicle stopped.

An analysis of the applicable legal standards, clearly and convincingly, supports the reversal ordered by the Ninth Circuit. As a general matter, Terry v. Ohio, supra, established law enforcement officers may stop or detain a person for investigative questioning if they can point to specific facts that reasonably indicate criminal activity. In both Terry v. Ohio and Adams v. Williams, 497 U.S. 143 (1972), the Supreme Court sustained this investigative technique where officers on the scene observed the accused in circumstances suggesting illegal activity. United States v. Brignoni-Ponce, supra, refused to extend the founded suspicion doctrine to circumstances where the officers, without any suspicion a particular vehicle was carrying aliens, stopped for questioning all vehicles in border areas.[4] The officers here sought to stop, question and search all vehicles coming within their profile. The officers' conduct goes beyond Brignoni-Ponce.

Even applying Brignoni-Ponce factors, the facts herein do not rise to this legal standard. The Brignoni-Ponce factors Border

---

[4] Brignoni-Ponce dealt with routes leading away from the border. Highway 86, in this case, is not a border access route.

Patrol officers may utilize in initiating a founded suspicion were stated as:

> "Any number of factors may be taken into account in deciding whether there is reasonable suspicion to stop a car in the border area. Officers may consider the characteristics of the area in which they encounter a vehicle. Its proximity to the border, the usual patterns of traffic on the particular road, and previous experience with alien traffic are all relevant . . . They also may consider information about recent illegal border crossings in the area. The driver's behavior may be relevant . . . Aspects of the vehicle itself may justify suspicion . . . In all situations the officer is entitled to assess the facts in light of his experience in detecting illegal entry and smuggling."

In the paragraphs that follow, the above factors will be reproduced seriatim. Each factor will be discussed as relevant to the facts in this case.

1. Proximity to the Border.

Highway 86 is the main access road to the Organ Pipe Cactus National Monument and to Rocky Point, Mexico. Both are camping areas. Proximity to the border has never been a talisman evaporating Fourth Amendment consideration. United States v. Martinez-Tapia, 419 F.2d 1375 (9th Cir. 1975) [Insufficient: vehicle stopped 1 1/4 miles from border because officer believed it came from known smuggling area.]; United States v. Peterson, 473 F.2d 874 (9th Cir. 1973) [Insufficient: vehicle stopped ten minutes away from port of entry because it departed area frequently used for smuggling.]

In order to determine whether proximity to the border is an appropriate factor depends upon the area involved and the officers' observation in that area. The area in this case is not a border access road. Although alien traffic may occur along the highway, the officers did not consider Highway 86 any more notorious a smuggling area than all of Southern Arizona. Officer Rayburn's testimony about the area was:

> "Q You indicated earlier that the distance--that that area inbetween those ranges, those two mountain ranges is frequently used by smugglers, is that correct, or aliens?

A Yes.

Q Or you believe it's used by aliens?

A Yes.

Q Isn't that in fact true from almost all of the border from Lukeville to Douglas?

A Yes, sir, it is." (RT 30-31)

2. Characteristics of the Area in Which the Vehicle is Encountered.

Border Patrol officers may also consider the characteristics of the area. Even if the chevron area is a sparsely populated desert area, the same can be said for the rest of Southern Arizona. The area's characteristics were unrelated to the vehicle stopped. If the stop had occurred between the suspected mileposts, a founded suspicion might have existed. Any suggestion that the characteristics of an area 27 miles east of the seizure point are an appropriate stop criteria is misplaced when the vehicle seized was never observed in the area.

3. Usual Patterns of Traffic.

According to the officers, the presence of defendants' vehicle was not unusual for the area. It was one of 20 others on the road. The record suggests traffic was normal for the time of day involved.

4. Previous Experience with Alien Traffic.

The officers testified that all types of conveyances including bicycles were used for transporting aliens. None of the officers' experience singled out the vehicle stopped as being more suspect than any other vehicle capable of carrying 8 to 20 persons.

5. Information About Recent Illegal Border Crossings in the Area.

No information was available regarding recent border activity.

6. The Driver's Behavior.

The driver promptly obeyed the signal to stop and did nothing out of the ordinary in response to the command to stop (RT 50, 94).

7. Aspects of the Vehicle.

The pickup truck equipped with a camper is not an inappropriate vehicle on an Indian reservation or Highway 86. In addition, agents did not observe anything unusual in the appearance of the truck suggesting it was heavily loaded or contained aliens. The Court of Appeals stated:

> "We pointed out that Carrizoza-Gaxiola, himself, was doing nothing suspicious. Here, too, the stop was solely a product of a profile, not of facts associated with the individual, his behavior or the specific appearance of his vehicle." (RT 6a-7a)

8. The Officers' Experience.

The officers testified about tracking aliens and looking for a vehicle traveling in both directions past their point. Their experience did not provide any basis other than conjecture for connecting defendants' vehicle with the chevron trail activity of the previous month.

The officers' actions, while in good faith, were not the product of good police work but rather a hunch. A hunch is not an appropriate basis for a founded suspicion. Beck v. Ohio, 379 U.S. 89 (1964).

CONCLUSION

To permit officers to use generalized suspicion without specific observations indicating some illegal activity is to completely ignore Fourth Amendment protections. The issue is not that founded suspicion can never be established on the basis of circumstantial evidence but that even if it can, it was not done in this case. In a roving patrol context, circumstantial evidence of a crime alone without any connection to a specific individual will not justify a governmental seizure to question and search.

This case does not present the evidence necessary to justify reliance upon a founded suspicion. The founded suspicion characteristics such as proximity to the border, usual traffic

patterns, previous experience with alien traffic, recent border crossings and the vehicles used were not present in this case. Their absence cannot justify either questioning the occupants or searching the vehicle.

If officers see people loading into a vehicle in a known or suspected smuggling area a founded suspicion could exist. It is quite another thing for the government to assert that a founded suspicion exists whenever a vehicle capable of carrying aliens is seen to traverse the highways of Southern Arizona. The government wants to change the specific articulable facts justifying an individual stop to a test of generalized suspicions for vehicles coming within or from a particular area.

The decision by the Court of Appeals has no significant effect upon law enforcement activity. It can be said, however, that the government's proposed founded suspicion test is a radical departure from previous case law and a return to the roving patrol acting without restraint. Terry v. Ohio, Adams v. Williams, and subsequent cases have clearly established police officers may briefly stop a vehicle or detain a person for investigative purposes, if they can point to specific facts that are reasonably indicative of criminal activity. In all previous cases, however, the specific facts or articulable circumstances have focused upon a specific person or vehicle. The existing test clearly distinguishes between the founded suspicion stop of a specific vehicle from the unfettered roving patrol condemned in Brignoni-Ponce.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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Respondents.

AFFIDAVIT OF SERVICE

BERNARDO P. VELASCO, being first duly sworn, deposes and says:

That in accordance with Rule 33(2)(a), Supreme Court Rules, he has served a copy of Respondents' Response on the United States Attorney for the District of Arizona, Tucson, Arizona, and has forwarded by mail a copy of the following documents to the Solicitor General, Department of Justice, Washington, D.C., on this 3rd day of October, 1979.

1. Motion for Leave to Proceed in Forma Pauperis;

2. Response to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit;

3. Affidavit of Service.

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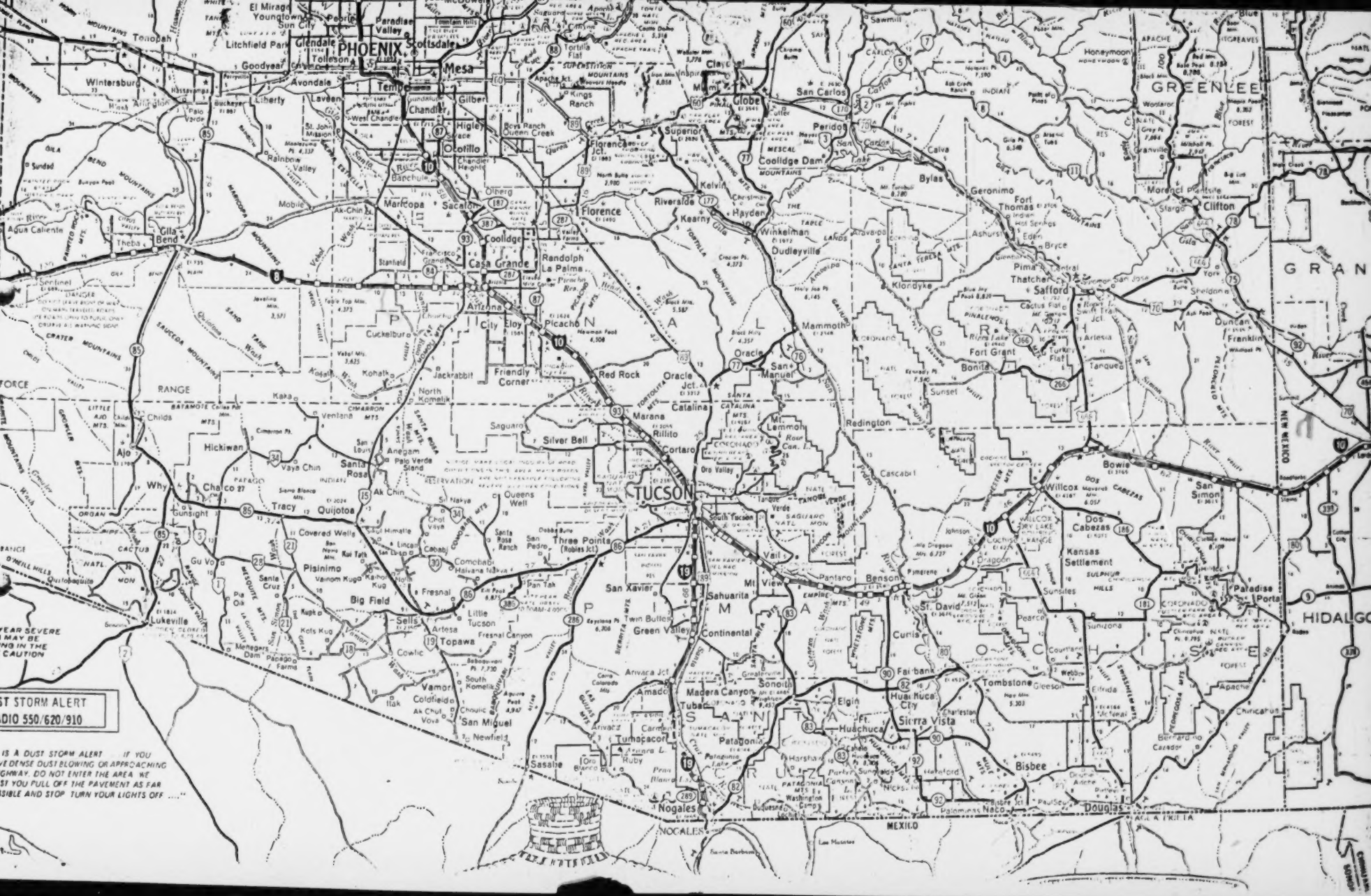
SUBSCRIBED AND SWORN to before me this 3rd day of October, 1979.

Margaret L. Jones
Notary Public

My Commission Expires:
March 3, 1980

E X H I B I T A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Oliberg
Mobile
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Rainbow Valley
Santa Cruz
Casa Grande Ruins
Superstition Mountains
Apache Trail
Tortilla Flat
Kings Ranch
Boys Ranch
Queen Creek
Higley
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Catalina
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Saguaro
Silver Bell
Three Points
(Robles Jct.)
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Covered Wells
Comobabi
Fresnal
Sahuarita
San Xavier
Twin Buttes
Green Valley
Continental
Arivaca Jct.
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Harshaw
Ft. Huachuca
Huachuca City
Sierra Vista
Tombstone
Bisbee
Fairbank
Benson
St. David
Pearce
Curtis
Cascabel
Redington
Mt. Lemmon
Catalina
Bowie
Willcox
Dos Cabezas
Kansas Settlement
Sunsites
Pomerene
Cochise
Dragoon
Johnson
Vail
Pantano
Mt. View
Rincon
Tanque Verde
South Tucson
Sabino Canyon
Saguaro Nat. Mon.
Tucson Mts.
Picacho Peak
Picacho Reservoir
Picacho Peak State Park
Black Mts.
Table Top Mts.
Sawtooth Mts.
Sand Tank Mts.
Growler Mts.
Ajo Mts.
Cabeza Prieta Game Range
Barry M. Goldwater Range
Organ Pipe Cactus Nat. Mon.
Quitobaquito
Gu Vo
Kuakatch
Kaka
Ventana
Chimarron
Batamote
Little Ajo Mts.
Growler Valley
Growler Wash
Sauceda Mountains
Sauceda Pass
Crater Mountains
Sand Tank Wash
Table Top Wash
Javelina Mts.
Javelina Wash
Quitobaquito Springs
Tule Wells
Kohatk
Kohatk Wash
Vekol Mts.
Vekol Wash
Santa Rosa Wash
Santa Rosa Mts.
Cimarron Mts.
Ventana Wash
Ak Chin
Ak Chin Wash
Ak Chin Indian Reservation
Papago Indian Reservation
Sierra Himalite
Kai Tah
Kuakatch
Kaka
Kaho Kug
Kats Kug
Vamori Kug
Menagers Dam
Pacacho Farms
Comobabi Mts.
Baboquivari Mts.
Baboquivari Peak
Kitt Peak
Quinlan Mts.
Quinlan Wash
Altar Wash
Altar Valley
Sasabe Peak
Aguila Peak
Aguila Mts.
Cabeza Prieta Mts.
Cabeza Prieta Game Range
Tule Wells
Growler Valley
Growler Wash
Sauceda Mts.
Sauceda Pass
Crater Mts.
Sand Tank Mts.